

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59
Unlawful Robocalls	)	

**COMMENTS OF NEUSTAR, INC.**

June 7, 2018

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**I. INTRODUCTION AND SUMMARY**

Neustar, Inc. (“Neustar”) hereby submits the following comments in response to the Federal Communication Commission’s (“Commission”) *Second FNPRM*.<sup>1</sup> Neustar supports the Commission’s goal of reducing unwanted calls made to phone numbers of consumers who provided consent but subsequently have been reassigned. However, Neustar does not believe that the establishment of a government reassigned numbers database is the best means to achieve this goal.

Today, a variety of commercial solutions are currently available to help callers avoid calling reassigned numbers. For example, Neustar offers a range of robust services designed to protect enterprise customers from exposure under the Telephone Consumer Protection Act (“TCPA”) for calling a reassigned number of a customer who previously consented to being called.<sup>2</sup> To offer similar protections, any reassigned numbers database established by the

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<sup>1</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC 18-31, CG Docket No. 17-59 (rel. March 23, 2018) (“*Second FNPRM*”).

<sup>2</sup> 47 U.S.C. § 227(a), (b).

Commission would essentially have to replicate the functionality of existing commercial solutions, which would be extremely challenging if not impossible for the reasons outlined below.

Instead, the Commission should create a safe harbor from TCPA liability for calls to reassigned numbers when callers utilize commercial solutions and otherwise have the consent of the intended customer to place the call. Creation of a safe harbor would create incentives for callers to utilize commercial solutions, while driving more consistency, understanding, and adoption, which would spur innovation and competition. Leveraging rather than attempting to replicate existing commercial solutions is the most practical and cost-efficient means to achieve the Commission's objective of reducing unwanted calls to reassigned numbers.

Given the availability of existing commercial solutions, the creation of a government reassigned numbers database would be ill-advised for several reasons. First, to the extent it would contain disconnect information alone as proposed in the *Second FNPRM*, the database's utility would be limited. And, overcoming such limitations would require more work either by the database administrator or service providers – work that would increase the costs of the database.

Second, the Commission's creation of a reassigned numbers database would put the government in competition with providers that currently make available commercial offerings designed to prevent calls to reassigned numbers. Such an approach would run counter to the Commission's regulatory philosophy that the federal government should not be in the business of competing with the private sector.

Third, the creation of a reassigned numbers database would be a costly and complicated exercise. It would be years before any such database would be operational, and even then would

provide only marginal benefits relative to commercial solutions available in the marketplace today. In short, a government reassigned numbers database fails even the most basic cost-benefit analysis.

Finally, a full and complete cost-benefit analysis also would require an assessment of the entities likely to use – and thus pay for – a government reassigned numbers database. The Commission cannot make this assessment, however, until it completes a pending proceeding examining threshold issues related to TCPA “interpretation and implementation” resulting from the D.C. Circuit’s decision in *ACA International v. FCC*.<sup>3</sup> Because resolution of these issues directly implicates the proposed creation of a reassigned numbers database, the Commission must wait until it concludes that proceeding before conducting the required cost-benefit analysis of its database proposal.

## **II. THERE ARE ROBUST COMMERCIAL SOLUTIONS AVAILABLE TO ENABLE CALLERS TO AVOID MAKING CALLS TO REASSIGNED NUMBERS.**

A number of providers currently offer robust commercial solutions for callers to identify – and avoid making calls to – reassigned telephone numbers. Rather than starting from square one to create a government reassigned numbers database, the Commission should adopt policies that foster continued growth in the commercial market and encourage use of available commercial solutions to address the problems associated with unwanted calls to reassigned telephone numbers.

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<sup>3</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, DA 18-493, CG Docket No. 18-152, CG Docket No. 02-278 (rel. May 14, 2018) (“Public Notice”) (citing *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018)).

The nature of the products currently on the market today underscores that preventing unwanted calls to reassigned numbers requires robust solutions that are far more comprehensive than the mere collection of disconnect data. For example, Neustar's commercial solution utilizes a multi-faceted approach that starts at an early stage in the phone number assignment process and is based upon insights from existing industry data and expertise. It utilizes authoritative intelligence around the linkages of a phone number to a consumer as well as attributes about that phone number to drive operational efficiencies. In addition to providing information about disconnected phone numbers, Neustar's solution: (1) tracks the movement of telephone numbers from wireline to wireless devices, a key distinction for TCPA compliance purpose; (2) identifies numbers of Voice over Internet Protocol ("VoIP") providers, which present TCPA risks, including the movement of telephone numbers to VoIP providers; (3) determines if a telephone number is still associated with the intended consumer, which involves utilizing additional intelligence to determine the name to number linkage, even if the initial consent was provided many years ago; and (4) leverages other unique insights to help companies make better and more informed dialing decisions.

Neustar also can proactively notify its outbound dialing customers when disconnects or other changes in linkages or insights occur, which allows relevant information to be disseminated more quickly without a caller having to initiate a database query or waiting to scrub its data at a later date, possibly calling reassigned numbers in the meantime. These insights, analytics, and processes provide the means for a business to respect consumer privacy when phone numbers are reassigned while preserving the ability of consumers to be contacted for legitimate business purposes.

Neustar's dynamic approach to maintaining accurate data enables Neustar to provide callers with comprehensive information about a consumer's name, phone number, valid consent, and other attributes that provide insights on who to call or text, as well as phone numbers representing high risk. In so doing, Neustar helps to ensure that its customers reach the right person, facilitate valid customer communications, and mitigate the risk of TCPA violations.

The solutions offered by Neustar and other commercial providers are considerably more robust than any database of reassigned or disconnected numbers the Commission could realistically create and maintain. To the extent there is a concern about the price of existing commercial solutions, the Commission should allow the market to continue to evolve, which already has led to the development of lower-price offerings to meet customer demand. Indeed, in Neustar's case, it originally converted a product designed to assist the financial services industry in combating identity fraud into a solution that enables companies to clean up their customer records and contact lists, including identifying numbers that have been disconnected and likely reassigned. Neustar's offerings have continued to evolve into variations designed specifically to suit the needs of different segments of the consumer contact marketplace and include solutions offered at different price points. Furthermore, customers routinely find that the costs of available commercial solutions to ensure TCPA compliance are offset by gains in operational and dialing efficiency and reductions in their TCPA exposure.

### **III. THE COMMISSION SHOULD CREATE A SAFE HARBOR FROM TCPA LIABILITY FOR CALLERS USING A COMMERCIAL SOLUTION THAT AVOIDS CALLS TO REASSIGNED NUMBERS.**

#### **A. Callers Utilizing Commercial Solutions Should Be Eligible for a Safe Harbor from TCPA Liability.**

To best ensure that callers take appropriate steps to avoid making unwanted calls to reassigned numbers, the Commission should establish a safe harbor from TCPA liability for

callers that have the requisite consumer consent from an earlier holder of the telephone number and utilize a commercial solution in a good-faith attempt to avoid calling a telephone number that has been reassigned.<sup>4</sup> Establishing such a safe harbor would serve important public policy purposes.

First, it would reduce unwanted calls by creating incentives for callers to utilize commercial solutions that allow the caller to avoid calling reassigned numbers. The annoyance to which recipients of unwanted calls are subject and the potential TCPA liability to which callers are exposed would likewise be reduced.

Second, by incentivizing callers to utilize commercial solutions to avoid calls to reassigned numbers, the Commission will drive product innovation and reduce costs. Providers of commercial solutions eligible for the safe harbor will be spurred to make available new offerings, expand the robustness of their current offerings, and offer services at different price points to meet increased demand. Callers and their customers will inevitably benefit from increased competition in the commercial solution marketplace.

## **B. The Commission Has Legal Authority to Create a Safe Harbor.**

The Commission has the legal authority to create a safe harbor of the type proposed here. It is an axiomatic principle of administrative law that “[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation . . . by the administering agency.”<sup>5</sup> As the administrative agency charged with implementing the TCPA, the Commission is authorized to interpret relevant provisions of the statute to enable and facilitate that implementation, and its

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<sup>4</sup> The safe harbor should not insulate callers from TCPA liability for all calls to reassigned numbers. *Second FNPRM* ¶ 31. If the caller did not have the requisite consent of the customer to whom the telephone number had originally been assigned, utilizing a commercial solution should not excuse the caller’s failure to comply with the requirements of the TCPA.

<sup>5</sup> *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).



interpretation is valid and will receive judicial deference as long as it is reasonable and not foreclosed by the statute.<sup>6</sup>

The Commission's interpretive authority permits the establishment of a safe harbor from TCPA liability based on a caller's use of a commercial solution to identify reassigned numbers to which calls should not be placed absent the called party's consent.<sup>7</sup> The TCPA exempts from liability calls made using an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice for which the caller has received a called party's "prior express consent."<sup>8</sup> In its 2015 *Declaratory Ruling*, the Commission "interpret[ed] that to mean reasonable reliance."<sup>9</sup> In other words, under the Commission's interpretation of the TCPA, a caller may "reasonably rely" on a party's prior express consent when making calls. To enact the safe harbor envisioned here, the Commission could find that a caller has reasonably relied on a party's prior express consent where the caller has obtained such consent and consults a commercial solution to identify and avoid placing calls to telephone numbers that subsequently were reassigned. In such as case, the caller will have exhausted reasonable means to avoid calling the wrong party.

The D.C. Circuit's recent opinion in *ACA International v. FCC* supports the Commission's authority to establish such a safe harbor. While invalidating the one-call safe harbor for calls made to reassigned numbers that the FCC adopted in its *Declaratory Ruling*, the court did not question the Commission's authority to create a safe harbor in the first place.

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<sup>6</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>7</sup> An essential prerequisite to any safe harbor is for the caller to have the consent of the intended party before that party's telephone number was reassigned. In other words, use of the commercial solution should not absolve a caller from TCPA liability if the caller never had the intended party's consent in the first place.

<sup>8</sup> 47 U.S.C. §§ 227(b)(1)(A), (b)(1)(B).

<sup>9</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*Declaratory Ruling*").

Instead, the D.C. Circuit found that the safe harbor established by the Commission that allowed one call to a reassigned number was arbitrary.<sup>10</sup> The court also implicitly accepted the Commission’s interpretation of “prior express consent” as incorporating a “reasonable reliance” standard, evaluating the one-call safe harbor against this standard.<sup>11</sup>

Moreover, the court in *ACA International* expressly contemplated and took no issue with the Commission’s authority to adopt the type of safe harbor envisioned here. Specifically, in invalidating the one-call safe harbor adopted in the *Declaratory Ruling*, the court noted that “the Commission is already on its way to designing a regime to avoid the problems of the 2015 ruling’s one-call safe harbor.”<sup>12</sup> Citing the *Second Notice of Inquiry* in this proceeding, the D.C. Circuit explained that the Commission is “considering whether to provide a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information.”<sup>13</sup> According to the court, the proposals under consideration in the *Second Notice of Inquiry* “would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission’s principle of reasonable reliance.”<sup>14</sup>

In short, there should be no serious question that the Commission has the statutory authority to adopt a safe harbor by which callers would be exempt from TCPA liability for calls

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<sup>10</sup> *ACA International v. FCC*, 885 F.3d at 706-09.

<sup>11</sup> *See id.* at 707 (“The Commission thus consistently adopted a ‘reasonable reliance’ approach when interpreting the TCPA’s approval of calls based on “prior express consent,” including as the justification for allowing a one-call safe harbor when a consenting party’s number is reassigned. The Commission, though, gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message.”).

<sup>12</sup> *Id.* at 709.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

to reassigned numbers by first utilizing a commercial solution to avoid calling a telephone number that has been reassigned.

#### **IV. THE COMMISSION SHOULD DECLINE TO CREATE A GOVERNMENT REASSIGNED NUMBERS DATABASE.**

##### **A. Creation of a Reassigned Numbers Database Would Provide Less Useful Information to Callers as Compared to Many Commercial Solutions Currently Available in Market Today.**

Under the Commission's proposal, the government reassigned numbers database would consist of "information about when NANP numbers are disconnected." *Second FNPRM* ¶ 15. In the Commission's view, disconnect information is readily available and would "best allow callers to identify, at the earliest possible point, when a subscriber can no longer be reached at that number." *Id.* However, disconnect data would not necessarily provide accurate insights into whether a telephone number has been reassigned and would inevitably lead to false positives.

First, a number can be considered "disconnected" for a variety of reasons that do not actually reflect a permanent termination of the relationship between a customer and a carrier. For example, a customer who fails to pay his or her telephone bill may be temporarily "disconnected," albeit only until the customer's bill is paid. Similarly, a carrier may treat a telephone number that has been ported to a competitor as "disconnected," even though the customer continues to use that number, albeit with a different carrier. In short, carrier disconnect data includes telephone numbers that have not truly been "disconnected."

Second, relying solely upon disconnect data would increase the risk of false positives, an approach that would harm consumers who may not receive communications from callers with information they want or need. For example, a customer who has ported his telephone number from carrier A to carrier B may not receive a fraud alert from the customer's bank because his telephone number is considered "disconnected."

Commercial solutions overcome deficiencies in disconnect data and amplify their effectiveness by adding other insights about the telephone number or the consumer. Creating a new database consisting solely of disconnect data would mean going back to the drawing board, likely increasing illegitimate calls and harming consumers in the process.<sup>15</sup>

**B. Creation of a Reassigned Numbers Database Would Be Inconsistent with the Commission’s Philosophy that the Government Should Not Be in the Business of Competing Against Private Enterprise.**

The creation of a government reassigned numbers database not only would suffer from practical flaws, but would undermine the current Commission’s ethos surrounding the relationship between government and private enterprise. The government’s entry into a marketplace should be confined to situations where there exists a market failure such that private enterprise has either been unwilling or unable to provide necessary services – a condition not present here.

That the government should not compete against private enterprise is a doctrine routinely endorsed by the Commission. Indeed, both Chairman Pai and Commissioner O’Rielly have vigorously criticized regulatory policies that would encourage government entry into competitive marketplaces. For instance, in opposing proposals for the federal government to own and operate a nationwide 5G network, Chairman Pai explained that “[t]he main lesson to draw from the wireless sector’s development over the past three decades—including American leadership in 4G—is that the market, not government, is best positioned to drive innovation and investment.”<sup>16</sup> The same is true in addressing the problem of reassigned telephone numbers.

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<sup>15</sup> To be sure, carriers could be required to segregate “true” disconnects that would be submitted to the government reassigned numbers database. However, imposing such a requirement would undoubtedly increase the costs of populating and operating the database.

<sup>16</sup> Press Release, “Statement of FCC Chairman Ajit Pai on the Future of 5G” (Jan. 29, 2018), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-348903A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-348903A1.pdf).

Commissioner O’Rielly has been similarly vocal that the government should not compete against the private sector. For example, in dissenting from then-Chairman Wheeler’s *Municipal Broadband Order* preempting two state laws that cabined the provision of broadband services by the respective states’ municipalities,<sup>17</sup> Commissioner O’Rielly expressed his “profound opposition to the offering of broadband or any communications service by a government entity.”<sup>18</sup> According to Commissioner O’Rielly, “the bedrock of American capitalism is private enterprise free from government manipulation as a market entrant.”<sup>19</sup>

Here, the Commission is proposing to create, operate, and maintain a database, the effect, if not the purpose of which, is to compete against private enterprise. This proposal is squarely at odds with the Commission’s regulatory philosophy and the proper role of government in a functioning competitive market. Consistent with that philosophy, the Commission should leave to private enterprise the development of solutions to minimize or prevent calls to reassigned numbers.

**C. Creation of a Reassigned Numbers Database Would Be a Costly and Complicated Exercise, While Providing Only Marginal Benefits Relative to Existing Commercial Solutions.**

Creation of a reassigned numbers database is no small undertaking. As identified in the *Second FNPRM*, the Commission must decide threshold questions about the scope of the database, including what information should be contained in the database, what information the

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<sup>17</sup> *City of Wilson, N. Carolina Petition for Preemption of N. Carolina Gen. Statute Sections 160a-340 et Seq.*, Memorandum Opinion and Order, 30 FCC Rcd 2408 (2015) (“*Municipal Broadband Order*”), *rev’d Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

<sup>18</sup> *Municipal Broadband Order*, (dissenting statement of Commissioner O’Rielly).

<sup>19</sup> *Id.* See also Remarks of FCC Commissioner Michael O’Rielly Before the Americans for Prosperity’s 2017 Defending the American Dream Summit, Richmond, VA (Aug. 19, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-346300A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-346300A1.pdf) (“While opponents try to . . . favor government-provided services over private-sector solutions, I will happily shout the virtues of American capitalism from the rooftops.”).

database will provide, and which types of service providers should be required to submit information to the database and how frequently they must do so. *Id.* ¶¶ 12-22. These are complicated issues that will not be easily resolved.

Even after the Commission settles on the parameters of the proposed database, it must address other thorny implementation issues, including who will have access to the database, who will administer the database, and how the cost of the database will be recovered. For example, to avoid misuse of the database (which is a valid concern), the Commission seeks comment on specific criteria or eligibility requirements that a user must satisfy, certification standards to which a database user would be required to adhere, and mechanisms for tracking those who access the database. There would be no need for the Commission to tackle these issues if it were to rely on market-driven commercial solutions instead.

Furthermore, regardless of how these issues are resolved, the costs of creating and maintaining a reassigned numbers database will be significant, although it is impossible to estimate accurately the development costs of a database before its parameters have been clearly defined. And, it would take years for any government database to become operational under the rosier of scenarios. Even then, the benefits of using a reassigned numbers database would be marginal and would pale in comparison to existing commercial solutions.

**D. The Commission Cannot Currently Conduct an Adequate Cost-Benefit Analysis of Creating a Government Reassigned Numbers Database.**

As noted above, the Commission cannot adequately conduct a cost-benefit analysis before resolving threshold issues about the parameters of the database – issues that will drive costs. Furthermore, in conducting the requisite cost-benefit analysis, the Commission must consider more than just the costs associated with the development and maintenance of a government reassigned numbers database. *Second FNPRM* ¶ 45. Rather, the Commission also

must assess how these costs translate into the fees that a caller utilizing the database would be required to pay; otherwise, the Commission could not determine whether its proposal to create a government database is the most “cost-effective” solution to address the problem of reassigned telephone numbers. *Id.*

However, this assessment requires that the Commission estimate the number of callers likely to utilize a reassigned numbers database – an estimate that the Commission cannot reasonably make at this juncture because of a pending proceeding that involves revisiting the definition of an ATDS. Specifically, the Consumer and Governmental Affairs Bureau (“Bureau”) has released its Public Notice seeking comment on several issues related to interpretation and implementation of the TCPA in light of the D.C. Circuit’s decision in *ACA International v. FCC*, including “what constitutes” an ATDS. The Bureau also has sought comment on a petition submitted by the U.S. Chamber Institute for Legal Reform and several other parties requesting the Commission to: (1) confirm that equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention in order to be an ATDS, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA’s restrictions.

If, after receiving comment on these issues, the Commission narrows the definition of ATDS, the effect would be to limit the reach of the TCPA and thereby reduce the number of entities that would need to consult a reassigned numbers database. In other words, a caller that makes calls without using autodialing capabilities under a revised definition of an ATDS would not be engaged in robocalling under the TCPA and thus would have no need to use a reassigned numbers database to avoid TCPA liability.

The number of users of the Commission's proposed reassigned numbers database is a critical input to the Commission's cost-benefit analysis. However, this input cannot reasonably be ascertained during the pendency of the Commission proceeding that could impact use of any reassigned numbers database. As a result, the Commission must wait until it concludes this proceeding before conducting the required cost-benefit analysis of its reassigned numbers database proposal.

## **V. CONCLUSION**

The Commission's efforts to address the scourge of robocalling is laudable. However, that goal is best achieved by leveraging existing commercial solutions to help callers avoid calling reassigned telephone numbers rather than establishing a government reassigned numbers database.

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Respectfully submitted,

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